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I think there is no error in the record, and the judgment and order appealed from should be affirmed.

THORNTON, J., also dissented.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ARKANSAS.¹

SUPREME COURT OF ILLINOIS.²

SUPREME COURT OF OHIO.³

SUPREME COURT OF VERMONT.⁴

ACCORD.

Payment of Part—Agreement to Accept from Third Person.—An agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money and execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act: *Gordon v. Moore*, 44 Ark.

An agreement by a creditor to accept from a third person, in behalf of the debtor, money or a security for a smaller sum in satisfaction of the whole, is valid and binding and will discharge the debt: *Id.*

AGENT. See *Mortgage*.

AMENDMENT.

Declaration—Damages—Increasing ad damnum after Verdict.—There is no error in allowing an amendment of a declaration by increasing the *ad damnum* after verdict. Such an amendment relates to matter of form, rather than substance: *Tomlinson v. Earnshaw*, 112 Ill.

ATTACHMENT.

Undisclosed Principal.—Property purchased by an agent in his own name for an undisclosed principal, cannot be seized for the debt of the agent unless his creditor has been misled by appearances or the conduct of the parties into giving him credit upon a false basis: *Reed v. McIlroy*, 44 Ark.

¹ From B. D. Turner, Esq., Reporter; to appear in 44 Ark. Rep.

² From Hon. N. L. Freeman, Reporter; to appear in 112 Ill. Rep.

³ From E. L. DeWitt, Esq., Reporter; the cases will probably appear in 42 or 43 Ohio St. Rep.

⁴ From Edwin L. Palmer, Esq., Reporter; to appear in 57 Vt. Rep.

BANKRUPTCY.

Debt Created by Fraud—Constructive Fraud.—The plaintiffs, as an accommodation to themselves, gave an order to the defendant directing their debtor to pay him what was due them. He collected and used the money by mingling it with his own; and in a few days afterwards was adjudged a bankrupt. After his discharge, in an action to recover the money, the court below found that there was no evidence tending to show actual fraud or fraudulent intent. The plaintiffs testified that when the order was given they told him "to keep the money until they called for it;" the defendant testified that they told him "to keep and use the money until they called for it." The jury found that the plaintiffs were right as to the instructions given: *Held*, that the defendant's duty was that of a bailee without hire; that his use of the money was a conversion of it and a fraudulent act; that the debt was "created by fraud," within the meaning of the bankrupt act and not discharged: *Hammond v. Noble*, 57 Vt.

BILLS AND NOTES. See *Surety*.

COMMON CARRIER.

Coupon Tickets over several Lines—Liability of Companies—Ejection of Passenger—Damages.—Through tickets in the form of coupons, sold to a passenger by one railroad company, entitling him to pass over successive connecting lines of road, in the absence of an express agreement create no contract with the company selling the same, to carry him beyond the line of its own road, but they are distinct tickets for each road, sold by the first company as agent for the others, so far as the passenger is concerned: *Pennsylvania Railroad Co. v. Connell*, 112 Ill.

Where a coupon ticket has been sold calling for passage over several distinct lines of railroad, the rights of the passenger, and the duty and responsibility of the several companies over whose roads the passenger is entitled to a passage, are the same as if he had purchased a ticket at the office of each company constituting the through line: *Id.*

Where a conductor of a railway company, acting under instructions from his superior, refuses to accept a ticket issued by another company as agent of the former, and demands full fare, the passenger, if his ticket was issued by authority, may pay the fare again and recover of the company requiring payment the sum paid, as for a breach of contract, or he may refuse to pay, and leave the train when so ordered by the conductor, and sue and recover of the company all damages sustained in consequence of his expulsion from the train; but if he refuses to leave, he cannot recover for the force used by the conductor in putting him off, when no more force is used than necessary, and the expulsion is not wanton or wilful: *Id.*

CONSTITUTIONAL LAW. See *Taxation*.

CORPORATION.

Forfeiture of Franchise—In what Proceeding to be Determined—Injunction—Ultra Vires.—A cause of forfeiture of a franchise can not be taken advantage of, or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation: *Attorney-General v. Chicago and Evanston Railroad Co.*, 112 Ill.

Where a corporation has ceased to exist, and is absolutely dead in law, a court of equity has jurisdiction to enjoin threatened acts by persons assuming to act on behalf of, and in the name of the dead corporation : *Id.*

And if a valid corporation assumes to exercise licenses or powers by virtue of an invalid ordinance of a municipal corporation, or in excess of authority legally conferred upon it, a court of equity, upon a proper showing, has jurisdiction to interfere and restrain it : *Id.*

DAMAGES. See *Common Carrier*.

DEBTOR AND CREDITOR.

Conditional Sale—Lease—Assignee.—Property sold conditionally and delivered, without a legal record of the lien, passes to the assignee of the vendee under the insolvent law : *Collender Co. v. Marshall*, 57 Vt.

A contract by which a vendee of billiard tables agrees to pay in monthly instalments in one year the entire value of the tables, and if he so paid the property was to be his, and if not, the vendor's, is a conditional sale, and not a lease : *Id.*

When one here orders goods from a party in New York on certain terms, as to payment, &c., but they are shipped, consigned to the vendor, and accepted on different terms : *Held*, that the contract was made in this state : *Id.*

FRAUD. See *Mortgage*.

FRAUDS, STATUTE OF.

Sale of Land—When not within.—The plaintiff's house being mortgaged, he entered into a parol contract with the defendant to purchase the mortgage, sell the house, and after satisfying the mortgage debt, costs, &c., to pay the balance to the plaintiff. The defendant purchased as agreed, foreclosed, and sold the house, the plaintiff in reliance on the contract allowing the equity of redemption to expire : *Held*, that the plaintiff in assumpsit could recover the balance; that the contract was not within the Statute of Frauds, in that it was not for the sale of lands or an interest in or concerning them, and could be completely performed within one year; that parol evidence was admissible to prove the contract : *McGinnis v. Cook*, 37 Vt.

Promise of Executor in consideration of Agreement not to Dispute Will.—The promise of an executor to pay \$5000 to one of the testator's heirs-at-law, who received nothing under the will, in consideration that he would forbear further opposition to the probate of the will, claimed to have been made as it was through undue influence, is not within the statute; and such forbearance is a sufficient consideration : *Bellows v. Sowles*, 57 Vt.

GUARDIAN AND WARD. See *Infant*.

Pledge of Ward's Property—Right of Ward as against Purchaser.—A former guardian of the plaintiff's ward pledged to the defendant bank to secure his own note two negotiable bonds owned by the ward, on which bonds was an endorsement tending to show the ward's ownership, and which was seen by the cashier at the time of the negotiation. *Held*, 1, that the defendant was not entitled to the protection of an innocent purchaser; that it was put upon inquiry, and that it was not

sufficient to only inquire of the guardian; 2, that the plaintiff could recover the bonds in an action of replevin; 3, that the settlement of the guardian's account in the Probate Court did not affect the title to the bonds: *Langdon v. Baxter Nat. Bank*, 57 Vt.

HUSBAND AND WIFE. See *Surety*.

INFANT.

Negligence of Child—Liability of Parent.—The relation of the defendants was that of father and son. The son was twenty-eight years old, and, while living with his father as a hired man on his farm, took his father's horse and drove three miles to the railroad depot to get one of his own friends. The father did not know that the son took the horse until after he was gone; but expected and was willing that he should do so. The son had driven the team before without permission. The horse, tied to a post in the rear of the depot, where the defendants were accustomed to hitch, broke away, ran into the plaintiff's team and injured him. The referee found that the son in tying the horse "did not exercise the prudence of an average prudent man:" *Held*, that the father was not liable, but that the son was; that license to use the horse could not be inferred from the fact of former use without leave: *Way v. Powers*, 57 Vt.

Duty of Court to protect—Failure of Guardian to interpose proper Defence.—An infant suitor or defendant, when brought into court, becomes the ward of the court, whose duty it is to see that his rights in the subject-matter of the litigation are properly presented and protected. If the general guardian fails to appear, the court should appoint a guardian *ad litem* to look after the infant's rights: *Lloyd v. Kirkwood*, 112 Ill.

If the guardian who undertakes this trust, whether he be the general guardian, or guardian *ad litem*, fails to properly protect the interests of the ward, it is the duty of the court, *sua sponte*, to compel him to do so whenever that fact comes to the knowledge of the court. The court should see that the proper pleadings are made to present any defence the infant may have: *Id.*

Where a bill to establish and enforce a resulting trust as against an infant heir, showed upon its face that the alleged trust arose twenty-five years before suit, and the court rendering a decree therein against the infant failed to require the guardian *ad litem* to set up the laches in defence, it was *held*, that the proceedings and decree against the infant showed error on their face, sufficient to justify the court in setting the decree aside on bill filed by the infant: *Id.*

LANDLORD AND TENANT.

Untenantable Premises.—The lessee of a room in a block covenanted to keep the premises in good and constant repair. A building was thereafter erected on an adjoining vacant lot by the owner thereof, not the lessor, whereby the demised premises were, to a great extent, cut off from light and ventilation, and were also rendered damp and unhealthy, but were capable of being made tenantable by repairs: *Held*, that the lessee was not authorized to abandon the lease and refuse payment of the accruing rent: *Hilliard v. N. Y. & C. Gas Coal Co.*, 42 or 43 Ohio St.

LIMITATIONS, STATUTE OF.

Cause accruing in other State.—The Statute of Limitation, R. L. s. 970, is not a defence, when the cause of action accrued in another state, unless both parties resided there at the time the cause of action accrued; thus, the plaintiff resided in Ohio and the defendants in Pennsylvania, when the debt was contracted, the residence of neither party having been changed: *Held*, that the statute was not a bar: *Troll v. Hanauer*, 57 Vt.

MANDAMUS.

The right to a writ of mandamus to enforce the performance of an official act by a public officer depends upon his legal duty and not upon his doubts; and where his duty is clear, its performance will not be excused by his doubts concerning it, however strong or honest they may be: *State v. Turpen*, 42 or 43 Ohio St.

MORTGAGE.

Fraud—Agency—Bona Fide Purchaser.—R., the owner, having sold land and taken a mortgage thereon from the vendee to secure the payment of the purchase-money, afterwards executed a release of the mortgage and took a second mortgage on the premises from the vendee, for the balance of the purchase-money then unpaid. The release and second mortgage were entrusted by R. to the vendee, to be by the latter entered for record. The vendee caused the release to be duly recorded, but failed to deliver the second mortgage for record. After the release was recorded, the vendee made his notes and executed a mortgage on the premises to L. to secure the same, without consideration therefor, which mortgage was immediately recorded, and on the 17th of January 1879, the notes were endorsed and delivered, and the mortgage was assigned by L. to J., a *bona fide* purchaser for a valuable consideration, without notice. After the mortgage to L. had been recorded, the vendee returned the unrecorded mortgage to R., who filed it for record on the 21st of April 1879: *Held*, that the mortgage of J. was the first and best lien on the premises: *Ramsey v. Jones*, 42 or 43 Ohio St.

NEGLIGENCE. See *Infant*.

Bridge Owners—Failure to prevent Accumulation of Drifts.—It is the duty of the owners of a bridge across a navigable stream to use reasonable diligence to prevent such accumulation of drift about the bridge piers, either above or below the surface of the water, as might endanger navigation; and for failure to use such diligence they will be liable for damages resulting from such obstruction to crafts navigating the river, unless there was contributory negligence in the careless and unskilful piloting of the craft; *St. Louis, Iron Mountain and Southern Railway Co., v. Meese*, 44 Ark.

Crossing Railroad Track—Omission to Stop, Look and Listen—Question for the Jury.—It is the duty of a person about to cross a railroad track, to approach cautiously, and endeavor to ascertain if there is present danger in crossing; and when the railroad track and crossing are so situated, that the approach of a train can not be seen, it may be the duty of a person about to cross, to stop and look, to ascertain if a train is coming: *Pennsylvania Co. v. Franer*, 112 Ill.

It is a question of fact for the jury to determine from the evidence, whether a person receiving an injury from the alleged negligence of another, and who sues to recover therefor, has exercised proper care and caution on his part, and not one of law. It is not for the court to tell the jury that certain facts constitute negligence, and an instruction so telling the jury is erroneous: *Id.*

In an action against a railway company, the court was asked by the defendant to instruct, that if the jury believed, from the evidence, that the plaintiff "could have discovered the approach of defendant's train, and avoided the injury in question by having stopped his mule before driving upon the track, and looking and listening for the approach of said train, then he can not recover in this case, unless," &c.: *Held*, properly refused, as it virtually took the question of fact (plaintiff's care or negligence) from the jury: *Id.*

PARENT AND CHILD. See *Infant*.

PARTITION.

Not Maintainable for Land adversely held.—A party claiming the legal title to an undivided interest in land cannot maintain proceedings for partition with his co-tenant, while his interest is held adversely by others. He must first establish his title at law: *Moore v. Gordon*, 44 Ark.

PARTNERSHIP.

Test of—Participation in Profits.—The rule that participation in the profits of a business, was the test of partnership as to liability to creditors, has been abandoned in England, and generally in America; and now the test is whether the business has been carried on in behalf of the person sought to be charged as a partner; *i. e.*, did he stand in the relation of principal towards the ostensible traders by whom the liabilities were incurred, and under whose management the profits have been made; but as between the parties themselves, the test has always been their actual intent; *Culley v. Edwards*, 44 Ark.

PLEADING. See *Amendment*.

RAILROAD. See *Common Carrier*; *Negligence*.

RECEIVER.

Application of Funds—Priority of Mortgages.—The holder of a second mortgage in an action to foreclose, made all lien holders parties, prior and subsequent, and moved for the appointment of a receiver to collect rents and income of the mortgaged lands pending the action. The appointment of a receiver was refused. Afterwards a junior mortgagee commenced an action to foreclose making all lien holders parties, and upon his motion a receiver was appointed: *Held*, that the fund collected by the receiver, was applicable to the liens on the property in the order of their priority: *Williamson v. Gerlach*, 42 or 43 Ohio St.

MORTGAGE. See *Receiver*.

REPLEVIN.

For Goods Intermixed.—Replevin cannot be maintained for a mass of

cotton in which the plaintiff's has been innocently mixed by the defendant, nor for an undivided share of the mass. It must be first separated and capable of identification : *Hart v. Morton*, 44 Ark.

SALE. See *Debtor and Creditor*.

STATUTE.

Construction of—When "may" means "shall."—The word "may," in a statute, means "shall" whenever the rights of the public or third persons depend upon the exercise of the power, or the performance of the duty to which it refers. The word has such meaning in the proviso of section 90 of the practice act : *James v. Dexter*, 112 Ill.

SURETY.

Collateral Note by Wife as Surety—Extension of Original.—Wise needed money to pay judgments that were pressing him. Willard agreed to endorse his note to S. for \$2700, at four months, if Wise and wife would make to him (Willard) their note for \$3000, at four months, secured by mortgage on the wife's land ; he to hold and use said mortgage to protect himself against loss and expense because of said endorsement. Neither note was paid at maturity. The mortgage note was never extended, but the other note was renewed by agreement of the parties to it for a valuable consideration. It remained unpaid, and Willard sued Wise and wife on the mortgage note. She set up the extension of the \$2700 note as a release of her property : *Held*, as Willard made no extension of the mortgage note he did not lose his right to enforce the mortgage for his indemnity. The extension of the \$2700 note did not affect the right of the wife to pay the \$3000 note and enforce reimbursement by her husband : *Wise v. Willard*, 42 or 43 Ohio St.

Collateral Note—Extension of Original.—Where the payee of a promissory note for \$1500 held another note of the makers for \$1000, given as collateral to the first note, with sureties, and payable at a time to which the payment of the principal note had been extended, and the payee after the maturity of the collateral note again extended the time of payment of the principal note for a definite time, by a valid agreement and without the consent of the sureties on the collateral note, he thereby discharged them : *Slagle v. Pow*, 42 or 43 Ohio St.

TAXATION.

Corporation—Shares of Non-Resident—Stockholders.—Under our statute the stock of non-resident stockholders of a corporation located in this state may be legally set in the list of the town in which the corporation has its principal place of business ; and the corporation compelled by mandamus to pay the taxes assessed upon such stock : *Town of St. Albans v. Nat. Car Co.*, 57 Vt.

A statute authorizing such taxation, and allowing the corporation to deduct the taxes thus paid from the dividends due to such stockholders, is constitutional : *Id.*

When a charter is taken subject to future legislation, it may be modified not only by special amendments, but also by a general law : *Id.*